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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re ROBERT M., Jr., Person Coming
Under the Juvenile Court Law.

B294281

(Los Angeles County
Super. Ct. No. 18CCJP06391A)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

ROBERT M., SR.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County,
Emma Castro, Juvenile Court Referee. Affirmed.

Suzanne Davidson, under appointment by the Court of Appeal, for
Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant
County Counsel, Brian Mahler, Deputy County Counsel, for Plaintiff and
Respondent.

INTRODUCTION

Father Robert M., Sr. (Father) appeals from a finding of dependency jurisdiction pursuant to Welfare and Institutions Code section 300, subdivision (b), over his minor child, Robert M., Jr. (R.M.).¹ Father contends his long history of cocaine use, up to a month before the jurisdictional hearing, did not constitute a current risk of harm to the child at the time of the hearing. We find no error in the court's conclusion that Father's recent drug use posed a substantial risk of harm to R.M., a child of tender years. Therefore, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The family consists of minor R.M. (born November 2014), mother Leslie A. (Mother), and Father. Mother and Father had dated for five years but were not married. They resided with the paternal grandfather (PGF), who was separated from the paternal grandmother (PGM), and both grandparents helped care for R.M.

Father had a prior criminal and child welfare history. In 2012, he was arrested for possession of a controlled substance, though the charge was later dismissed. In 2015, police were summoned because Father was threatening to kill himself after having taken several pills. At the time, Father tested positive for cocaine and alcohol, and entered a six-month outpatient treatment program. Father was involuntarily hospitalized and the allegations were investigated, but the findings were inconclusive.

A. Detention Report and Detention Hearing

The family came to the attention of the Department of Children and Family Services (DCFS) through a call to the child abuse hotline on August 24, 2018 from Mother's therapist. The therapist reported that Mother had expressed concern about Father's cocaine addiction. Father had entered a rehabilitation facility in May 2018, and had recently relapsed. Mother had observed Father spending 45 minutes in the bathroom every day after work.

¹ Undesignated statutory references are to the Welfare and Institutions Code.

Afterwards he appeared sweaty and twitchy, and his behavior and affect changed. At times, Mother had to leave the house because of his drug use.

A week later, on August 30, a social worker visited the family's home. R.M. was observed to be active and healthy, with no visible marks or bruises, and developmentally appropriate. The home was clean and organized, with ample food, working utilities, and no safety hazards. Mother now denied Father had recently relapsed, explaining that what she had reported in therapy referred to Father's previous drug use. Father also denied any drug use or recent relapse. However, he tested positive for cocaine that day.

During subsequent interviews two weeks later, Mother elaborated that "about a year ago," she had separated from Father because he was using drugs. She claimed he had since completed a 30-day rehabilitation program. Father expressed surprise at his positive drug test result, as "he had just gotten out of rehab in 'June or July' [of 2018]." He refused to answer additional questions.

A removal order was granted on September 24, 2018. The next day, Mother notified the social worker that she and R.M. would be moving to the maternal grandmother's home.

Citing grave concerns for the child's safety, the detention report recommended R.M. be detained from Mother and Father. It noted Father had failed to demonstrate a "lifestyle free of drug use" since 2015, and there had been "no change in behavior and a continued pattern of conduct." He continued to minimize his substance abuse, was noncompliant with his sobriety plan, and still required "intensive intervention" for his drug dependency. Moreover, "Mother reported [F]ather has relapsed while the child . . . was under their care. Mother voiced concerns regarding [F]ather's substance abuse and disclosed she believed [F]ather was consuming drugs while in the home when child . . . and herself were present."

At the October 4 detention hearing, the court detained R.M. from Father and released him to Mother under the condition that Mother reside with PGF, and PGM assist with childcare. The court also ordered monitored visitation for Father, drug testing, and proof of his participation in drug counseling.

B. Jurisdiction/Disposition Report

DCFS filed a jurisdiction/disposition report on October 31, 2018 and conducted additional interviews that month. Father admitted he had a history of substance abuse but alleged he had been sober for four years, until the stress of losing his job in April 2018 caused him to relapse.

Father initially said he was 18 years old when he first experimented with drugs. He later stated he tried drugs for the first time in 2015, when he was approximately 27 years old. However, when asked about his 2012 arrest, he admitted he had “cocaine, I guess.” He denied he had a cocaine dependency, and claimed not to know about his positive test results in 2015. Contradicting himself, Father both admitted to and denied having a drug problem: “I’m in the program. I’m addressing the problem. I’m not gonna admit to something I have not. I don’t have a problem.” When asked why he was attending a drug treatment program, he replied he was “[j]ust going to class” to learn about “triggers” and “how to stay focused,” which did not mean he had an addiction. Father reported his last drug use was three or four months ago, in June or July 2018. But when reminded of his positive test result in August, Father revised his answer and called the incident a “stupid mistake.”

Father had participated in a 30-day treatment program in May 2018 and had regularly attended Narcotics Anonymous (NA) meetings since then. When asked why he attended the program, Father denied having a drug dependency problem but at the same time explained his treatment goal was to “stay focused and strong and stay sober.” He admitted having used marijuana once a week for leg pain, but alleged the last time had been in August 2018.

Mother minimized Father’s drug dependency, denying her previous statements that Father appeared twitchy and spent an excessive amount of time in the bathroom. However, she had recently separated from Father after learning of his positive drug result. When asked about Father’s enrollment in a treatment program in May 2018, Mother explained it was due to his “little bit of depression” and to prevent any relapse. Mother’s therapist was interviewed and confirmed that in August 2018, Mother had told him that Father relapsed “a couple of weeks ago and that [his] drug use

was current.” Mother was in therapy for “co-dependency services for family and partners of addicts.”

Father was noted to have a strong bond with R.M., an active presence in his life, and a strong family support system. He visited R.M. three times a week at PGM’s home under her supervision. He had begun participating in the proposed case plan, which included substance abuse counseling, individual counseling, and random drug testing. At the time of the interview, Father was attending addiction classes six hours a day, six days a week as part of an inpatient treatment program.

R.M. was observed to be developing well, with no medical, behavioral or emotional concerns. However, the report concluded: “At this time, the case issues that brought the child to the Court and [DCFS]’s attention have yet to be resolved. Therefore, the [child’s] safety cannot be ensured without continued court supervision until the parents demonstrate substantial progress in the recommended case plan.” The report identified Father’s lack of understanding of the severity of his drug use as a specific area of concern: “His lack of insight and impaired judgment continue[] to place his young child at risk if the child is returned to his care, and the child is of tender years who requires close level of supervision.”

C. Jurisdictional/Dispositional Hearing

An amended juvenile petition on behalf of three-year-old R.M. contained one count under section 300, subdivision (b)(1), alleging that Father’s recent cocaine use interfered with his ability to provide regular care of the child, and placed the child at risk of serious physical harm (count b-1).²

At the jurisdictional/dispositional hearing on November 6, 2018, Father’s testimony was inconsistent. He testified that prior to the day in August 2018 when he tested positive for cocaine, he had last used cocaine in 2015. When asked about his enrollment in a rehabilitation program in May 2018, he explained he “just checked [himself] in” out of “precaution” to

² The original dependency petition, filed October 3, 2018, charged Mother under the same count with failure to protect R.M. from Father’s substance abuse. The court struck the allegations against Mother at the jurisdictional hearing.

prevent a relapse and “have a better understanding about [staying] sober.” Contradicting his earlier testimony, he denied using cocaine prior to May 2018. Although he was currently enrolled in addiction classes, and attended up to 14 NA classes per week, he could not recall what he had learned and claimed not to believe in the 12-step treatment methodology. Father later testified he used cocaine for the first time in 2015. He reiterated he did not use cocaine between 2015 and August 2018, but regularly attended NA meetings during those three years “just to refresh [his] memory.” He later admitted that sometime in 2017, Mother asked him to leave the house due to his drug use.

Although Father initially testified he always took care of R.M. along with PGM, he later clarified he took care of R.M. on his own “probably twice a week,” as recently as August 2018 before DCFS involvement. He denied that he was ever under the influence when caring for R.M. Father had just secured a new job, and PGM would continue caring for R.M. while Father was at work.

Father submitted letters from his drug treatment program and parenting class, as well as drug test results, at trial. He had “diligently” participated in an intensive drug treatment program during the month of October, consisting of group therapy six days a week, random drug testing, daily NA meetings, and individual counseling. As of November 2, he was enrolled in an outpatient program with NA meetings two days a week for a minimum of four to six months. He was also enrolled in a 12-week parenting class as of October 30. His drug test results from five different dates in October were negative for cocaine, but positive for THC (marijuana).

Mother testified she first became aware of Father’s drug use when he was hospitalized in 2015. She confirmed that between April and August 2018, when Father was unemployed, he cared for R.M. at least two days a week. However, Mother claimed she never worried for R.M.’s safety because a family member was always around to help care for him.

The court found the amended petition true, and found R.M. a person described under section 300. It noted: “The court makes these findings because the court finds the father not to be credible in his denial that he has a recent use of illegal drugs. The court finds it incredible that the father

would not only complete an inpatient program but also participate in an outpatient program and participate in daily NA meetings when he is testifying that he's only used illicit drugs on one occasion in the last three years. The court did not find his answers to be credible in terms of his demeanor and his responses. He was inconsistent in his responses to many of the questions that were asked of him. . . . The court believes that the father has a recent drug abuse issue; that he is aware of it; that the mother was concerned enough to have shared this with her therapist; that the father's going into the bathroom . . . for 45 minutes at a time on a regular basis is outside of the norm of regular use of a bathroom in one's home. This is a child of tender years. The father has tested positive for marijuana. He has admitted to marijuana use. He is taking care of this little boy at least from April to August I found the father's denials of any history of drug use, except for that one occasion, to be lacking in truthfulness and honesty." Turning to disposition, the court removed R.M. from Father's custody and placed him with Mother, allowing Father monitored visitations and ordering continued drug treatment and testing.

Father timely appealed.

DISCUSSION

A. Governing Law

We review the juvenile court's jurisdictional findings and order for substantial evidence. (*Los Angeles County Dept. of Children & Family Services v. Superior Court* (2013) 215 Cal.App.4th 962, 966; *In re R.C.* (2012) 210 Cal.App.4th 930, 940.) Under this standard, "[w]e review the record to determine whether there is any substantial evidence to support the juvenile court's conclusions, and we resolve all conflicts and make all reasonable inferences from the evidence to uphold the court's orders, if possible." (*In re David M.* (2005) 134 Cal.App.4th 822, 828.) We defer to the lower court on issues of credibility. (*In re Tania S.* (1992) 5 Cal.App.4th 728, 733-734.)

Section 300, subdivision (b) permits the assertion of jurisdiction where "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability

of his or her parent . . . to adequately supervise or protect the child . . . or by the inability of the parent . . . to provide regular care for the child due to the parent's . . . substance abuse.” Where the child has not suffered actual harm, the evidence must establish ““that at the time of the jurisdictional hearing the child is at substantial risk of serious physical harm” [Citation.]” (*In re A.G.* (2013) 220 Cal.App.4th 675, 683.)

“Although section 300 generally requires proof the child is subject to the defined risk of harm at the time of the jurisdiction hearing [citations], the court need not wait until a child is seriously abused or injured to assume jurisdiction and take steps necessary to protect the child [citation]. The court may consider past events in deciding whether a child currently needs the court's protection. [Citation.] A parent's “[p]ast conduct may be probative of current conditions” if there is reason to believe that the conduct will continue.’ [Citations.]” (*In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1383-1384; *In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1215.)

“In addition, the Legislature has declared, ‘The provision of a home environment free from the negative effects of substance abuse is a necessary condition for the safety, protection and physical and emotional well-being of the child. Successful participation in a treatment program for substance abuse may be considered in evaluating the home environment.’ (§ 300.2.) Exercise of dependency court jurisdiction under section 300, subdivision (b), is proper when a child is ‘of such tender years that the absence of adequate supervision and care poses an inherent risk to [his or her] health and safety.’ [Citations.]” (*In re Kadence P.*, *supra*, 241 Cal.App.4th at p. 1384; *In re Christopher R.*, *supra*, 225 Cal.App.4th at p. 1216.)

B. Substantial Evidence Supports The Jurisdictional Findings.

On appeal, Father does not dispute that he was a substance abuser. Indeed, the record established Father's extensive history of cocaine dependency, and difficulty staying sober despite participation in multiple treatment programs. He was arrested for possession of a controlled substance in 2012, presumably cocaine. In 2015, he was hospitalized for irrational behavior and tested positive for cocaine. He enrolled in a drug treatment program, but in 2017, Mother separated from him because he was

using drugs. In May 2018, he entered another treatment program, but relapsed soon after. Mother confided to her therapist that Father was acting strangely, and probably getting high while caring for R.M. He tested positive for cocaine in August 2018, and tested positive for marijuana throughout October 2018 during treatment, the month before the jurisdictional hearing. In his briefs, Father acknowledges “he was aware that his cocaine use posed a problem and it needed to be addressed.” However, he disputes that his substance abuse posed a substantial risk of harm to R.M. at the time of the jurisdictional hearing.

Substantial evidence supports the court’s finding that Father’s recent drug use placed R.M. at risk of serious physical harm. Risk to a child from substance abuse can be established either by (1) proof of “an identified, specific hazard in the child’s environment,” or (2) proof that the child is of “tender years,” in which case “the finding of substance abuse is prima facie evidence of the inability of a parent or guardian to provide regular care resulting in a substantial risk of physical harm.” (*In re Drake M.* (2012) 211 Cal.App.4th 754, 766-767, italics omitted.) At the time of the jurisdictional hearing, R.M. was three years old and a child of “tender years.” Thus, the risk of harm to R.M. is presumed, and DCFS was not required to show “an identified, specific hazard” resulting from Father’s substance abuse. (See *In re Christopher R.*, *supra*, 225 Cal.App.4th at p. 1216 [substance abuse by parent of child under six years old is prima facie evidence of parent’s inability to provide regular care, and jurisdiction is proper because absence of adequate care poses inherent risk to child’s safety].)

Father cannot successfully rebut the “tender years” presumption that his substance abuse posed a substantial risk of harm to R.M. Father contends he rebutted the presumption because: (1) “he admitted to his recent use [of drugs] and was cooperative with the department;” (2) he had tested clean for cocaine by the time of the jurisdictional hearing; and (3) he had the help and support of his parents in caring for R.M. while he sought treatment. As a result, Father argues, DCFS failed to establish a causal nexus between his drug use and a substantial risk of harm. Father’s reasoning is flawed. First, the causal nexus between his drug use and a substantial risk of harm is presumptively established because R.M. is a child of “tender years.” Next,

even at the time of the jurisdictional hearing, Father refused to acknowledge his recent cocaine use, and testified inconsistently about it. The court evaluated his demeanor and testimony, and found him “not to be credible in his denial that he has a recent use of illegal drugs,” noting it was “incredible” that he would commit to such intensive treatment programs “when he is testifying that he’s only used illicit drugs on one occasion in the last three years.” The court unequivocally found that Father “has a recent drug abuse issue.” Although Father had tested clean for cocaine in the month before the jurisdictional hearing, he tested positive for marijuana on each of five tests administered that month, suggesting an ongoing substance dependency. Finally, it was irrelevant that he had the help and support of the grandparents while he participated in rehabilitation efforts, because both Mother and Father testified that Father was solely responsible for R.M. two days a week while he was still using cocaine. Thus, Father cannot rebut the presumption that his substance abuse posed a substantial risk of harm to R.M.

Father contends the court erred in relying on Father’s positive test result from a month before the jurisdictional hearing to conclude he posed a current risk of harm to R.M. But the court clearly considered Father’s history of drug addiction, and was “not required to disregard the [parent’s] prior conduct. [Citation.] ‘[P]ast events can aid in a determination of present unfitness.’ [Citation.]” (*In re Troy D* (1989) 215 Cal.App.3d 889, 900; accord, *In re J.N.* (2010) 181 Cal.App.4th 1010, 1025-1026 [“parent’s current understanding of and attitude toward the past conduct that endangered a child” is relevant to court’s assessment of risk]; *In re Kadence P.*, *supra*, 241 Cal.App.4th at p. 1384 [“‘[p]ast conduct may be probative of current conditions’ if there is reason to believe that the conduct will continue.” [Citations.]”].) Here, the court could take steps to protect R.M. based on its determination that Father’s past conduct and his current understanding of and attitude toward his past conduct placed R.M. at substantial risk of harm. (See *In re N.M.* (2011) 197 Cal.App.4th 159, 165; *In re Christopher R.*, *supra*, 225 Cal.App.4th at p. 1215.) Father had a long history of drug abuse and persistently denied, or was evasive about, his drug abuse. The court reasonably concluded that the risk of harm to R.M. was not eliminated after a

mere month and five arguably clean test results. (Cf. *In re David M.*, *supra*, 134 Cal.App.4th at p. 830 [mother tested negative for drugs 18 times over four and a half months before jurisdictional hearing]; *In re Destiny S.* (2012) 210 Cal.App.4th 999, 1004 [at the time of jurisdictional hearing, mother had tested clean for three months].)

Father cites several cases for the proposition that a parent's drug use alone, without evidence of risk of harm, does not justify the juvenile court's exercise of jurisdiction over his or her child. (See *In re Destiny S.*, *supra*, 210 Cal.App.4th at p. 1003; *In re Rebecca C.* (2014) 228 Cal.App.4th 720, 727-728.) Father also relies on *In re A.L.* (2017) 18 Cal.App.5th 1044 to argue that a strong family network to help care for a child while the parent seeks treatment can overcome a finding of risk of harm. These cases are distinguishable because the children involved were not of "tender years." (See *In re Rebecca C.*, *supra*, at pp. 722, 724 [mother's relapse caused no harm to 13-year-old child]; *In re Destiny S.*, *supra*, at p. 1004 [11-year-old child "was old enough to avoid the kinds of physical dangers which make infancy an inherently hazardous period of life"]; *In re A.L.*, *supra*, at pp. 1046, 1051 [15-year-old and 11-year-old children "were not youngsters" and were aware of mother's mental illness, had done research about it, and "knew what to do when [she] was in a manic state" due to their "maturity and experience"].) Furthermore, we find *In re A.L.* distinguishable because the mother suffered from a mental illness, not a drug addiction, and "the law is settled that harm may not be presumed from the mere fact of a parent's mental illness. [Citations.]" (*In re A.L.*, *supra*, at p. 1050.) In contrast, R.M. was three years old, and no evidence of a specific risk of harm was required. In short, the court's jurisdictional finding is supported by substantial evidence.

DISPOSITION

The court's jurisdictional finding and related dispositional order are affirmed.

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MANELLA, P. J.

We concur:

WILLHITE, J.

COLLINS, J.